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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 103

JAMES S. TURNER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

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To:

The Honorable The Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States.

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered April 1, 1954 affirming a judgment of conviction in a criminal case.

OPINIONS BELOW

There was no opinion in the District Court.

The opinion of the United States Court of Appeals for the District of Columbia Circuit rendered April 1, 1954 is not yet reported but is contained in the certified transcript of record submitted herewith at page 124.

JURISDICTION

The jurisdiction of this Court is invoked under Rule 37(b), Federal Rules of Criminal Procedure and Title 28, par. 1254, United States Code.

The Judgment of the United States Court of Appeals for the District of Columbia Circuit was entered April 1, 1954. On April 26, 1954 the Chief Justice extended the time for filing a petition for writ of certiorari to and including May 31, 1954.

QUESTIONS PRESENTED

I.

Whether the directive that a search warrant, "*shall state the grounds or probable cause for its issuance,*" contained in Rule 41 (c) Federal Rules of Criminal Procedure is satisfied by a simple recital in the warrant that it has been made to appear by affidavit that certain contraband is concealed within premises sought to be searched without any factual statement as to basis of its issuance?

II.

Whether the trial Court erred in denying petitioner's motion for judgment of acquittal at the close of all the evidence?

A.

Whether there may be a valid conviction of a violation of 26 U. S. C. 2554(a) in the absence of proof that a sale of

narcotics was made not in pursuance of a written order form?

B.

Whether petitioner's conviction of the purchase and concealment of narcotics may be upheld upon evidence showing only that he was present in rooming house premises owned by him, but occupied by several persons, at a time when narcotics were found in the kitchen of said premises?

III.

Where a bill of particulars filed by the government indicates a single transaction involving 15 capsules of a narcotic, the evidence relates itself to a single transaction and the charges of sale and concealment of the 15 capsules is split into two pairs of counts in the indictment, each pair charging the sale and concealment of *part* of the 15 capsules, does the dismissal of one pair of counts by the prosecution during trial bar prosecution of the remaining counts under the principles of res judicata and former jeopardy so as to entitle accused to an acquittal upon the remaining counts?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Four of the Constitution of the United States.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment Five of the Constitution of the United States.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

THE STATUTES AND RULES INVOLVED

Title 21, Section 174, United States Code (1940 Ed.)

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall, upon conviction, be fined not more than $5,000.00 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Title 26, Section 2553(a), United States Code (1940 Ed.)

"It shall be unlawful for any person to purchase, sell, dispense, or dispense, or distribute any of the drugs mentioned in section 2550(a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax."

Title 26, Section 2554(a), United States Code (1940 Ed.)

"It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in

section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary."

Rule 41(c), Federal Rules of Criminal Procedure

(c) ISSUANCE AND CONTENTS.

"A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned."

REASONS FOR ALLOWING THE WRIT

1. This Court has not yet defined Rule 41(c) Federal Rules of Criminal Procedure as to the requirements of a search warrant issued thereunder. By its text, that rule commands that a search warrant state the GROUNDS or PROBABLE CAUSE for its issuance. The United States Court of Appeals in several decisions has held, in effect, that a mere recital in the warrant that probable cause for the belief that contraband is concealed in certain premises has been shown by affidavit, without more, meets this requirement. This Court, being the body that formulated the Rules of Criminal Procedure is peculiarly suited to their

interpretation. From the language of the rule it would appear that "*grounds or probable cause for its issue*" means the FACTS upon which issued. A similar question was presented in *Grau* v. *United States*, 287 U. S. 124, 77 L. ed. 212 but was not decided by this Court. The application and interpretation of Rule 41(c) are questions now before this Court on petitions for writ of Certiorari in two other cases, *Ledbetter* v. *United States*, No. 522 (Misc. October Term, 1953 and *Shay et al* v. *United States*, No. 704, October Term, 1953. The questions involved in all of these cases is one of general importance and one that should be decided by this Court.

2. It is of great importance to have a decision of this Honorable Court setting forth the requisites of a conviction for sale of narcotics in violation of 26-2554(a) U. S. Code where the alleged purchaser is not a witness and where there is no testimony concerning any transaction between the alleged purchaser and accused. The questions involved are novel, and so far as known have never been presented to this Court.

3. The question of "splitting" of a criminal cause of action in a Federal Court has not heretofore been decided by this Court. The fact that this may be contrary to Amendment V of the Constitution of the United States where the United States is permitted to successfully prosecute one offense in separate counts of an indictment is one that compels the attention of this Court.

STATEMENT

Eugene Nedab, a peddler of narcotic drugs, known to the Police Department as such, and from whom Dante Longo, an undercover officer of the Police Department has purchased narcotics on four occasions, was contacted by Officer Longo on April 22, 1952 and arrangements made whereby Longo would again purchase narcotics from Nedab. At about 6:45 p.m. Longo drove Nedab in his

automobile to the vicinity of premises owned by petitioner (R. pg. 29). Officer Longo gave to Nedab $20.00 in money for purchase of capsules of Heroin. The serial numbers of the bills had been marked and recorded and the money treated with "counter-glow" powder. Nedab left the automobile of Officer Longo and disappeared from view (R. pg. 30). Nedab had not been searched before leaving Longo's car. Another officer observed Nedab approach the premises of petitioner. About 6:58 p.m. Nedab returned to the automobile of Officer Longo and delivered to him eight capsules containing Heroin, and was arrested by Officer Gabrys. Eventually he pleaded guilty to a several count indictment charging, inter alia, the sale of the eight capsules of Heroin to Officer Longo. At the time of his arrest Nedab was found to have on his person, seven (7) additional capsules of Heroin (R. pg. 22).

Shortly after the arrest of Nedab the premises of petitioner were forcibly entered under color of search warrant previously issued that day by the United States Commissioner for the District of Columbia by certain other officers of the Metropolitan Police Department (R. pgs. 36, 73, 76).

Inside the premises the raiding party arrested petitioner and his co-defendant, Elaine A. Lee. Lee had about her person some of the marked money previously given by Officer Longo to Nedab. The hands of Lee, when examined under an ultra-violet lamp, revealed the presence of the "counter-glow" powder. Petitioner was *not* found in possession of any of the marked money, and when examined, his hands revealed that he had *not* handled the money treated with the "counter-glow" powder. Also arrested in the premises was another person who lived therein; this individual, "Winston", was later released. The premises 4107 Eighth Street, N. W., were jointly owned by petitioner and his wife, Dorothy Turner. Petitioner had rented five bedrooms in the premises to various persons (R. pg. 102), including one room to his co-defendant, Lee, and one room to one, *Chaney,* a dope peddler, but

not known to petitioner as such. Chaney was not present at the time of the "raid". The several roomers in petitioner's premises had access to and use of a common kitchen. In the common kitchen sink there was found a bottle containing 72 capsules of a Heroin mixture. A copy of the search warrant was given to petitioner. There were no attachments to the copy of the warrant served upon petitioner (R. pgs. 2, 112).

When questioned on the premises, in the presence of petitioner, Elaine Lee denied knowledge of the presence of the bottle containing the capsules of Heroin and denied a sale of narcotics to Nedab. Later at the Women's Bureau and out of the presence of petitioner, Lee made an oral statement which incriminated herself and petitioner which was ruled to be inadmissible against petitioner is not here pertinent and is therefore not discussed.

A seventeen count indictment was thereafter filed in District Court charging petitioner and Elaine A. Lee with certain violations of the narcotic laws. Certain counts of the indictment were dismissed by the Court upon the motion of the government during the trial such that only counts 12, 13, 14, 15, 16, 17, are pertinent here. These counts of the indictment are printed at pages 11 and 12 of the record herein.

The Court granted a motion for bill of particulars and the United States filed the following:

Bill of Particulars

> 1. The eight capsules referred to in counts twelve and thirteen in the indictment were delivered to Eugene Nedab at one and the same time as the seven capsules referred to in counts fourteen and fifteen in the indictment."

Petitioner's motion to strike and dismiss counts 12, 13, 14 and 15 of the indictment on the ground of duplicity was denied (R. pgs. 13, 14) as was his motion for a severance.

Petitioner's motion to suppress evidence (R. pgs. 12, 13) was heard and denied (R. pgs. 121, 122). Petitioner urged as his two principal reasons for suppressing the evidence: (1) his premises were entered in violation of his rights under the Constitution in that the affidavit upon which the search warrant was issued (R. pg. 4) did not show probable cause and, (2) the warrant was defective upon its face in that it failed to state the grounds or probable cause upon which it was issued. During the trial petitioner objected to the admission of the seized evidence upon the same grounds (R. pg. 35). The evidence was admitted.

Petitioner moved for a judgment of acquittal as to counts 12 and 13 of the indictment on the grounds of former jeopardy and res judicata, it being admitted that counts 14 and 15 dismissed by the government during trial charged in part the very same sale and possession of narcotics and was charged in counts 12 and 13. The motion was denied.

Petitioner was convicted under counts 12, 13, 16 and 17 of the indictment and received a total sentence of 40 months to 10 years imprisonment (R. pg. 16). The Court of Appeals affirmed the judgment of District Court (R. pg. 124).

ARGUMENT AND BRIEF

I.

THE DIRECTIVE IN RULE 41(c) FEDERAL RULES OF CRIMINAL PROCEDURE THAT THE SEARCH WARRANT STATE THE "GROUNDS OR PROBABLE CAUSE FOR ITS ISSUANCE" IS NOT SATISFIED BY A RECITAL OF LEGAL CONCLUSIONS, FACTS MUST BE STATED.

The search warrant executed upon petitioner's premises did not state the grounds or probable cause for its issuance as required by Rule 41(c) Federal Rules of Criminal Procedure. (R. pg. 2) Nor was this deficiency cured by the attachment of an affidavit or other paper to the warrant served upon petitioner (R. pg. 112). In pertinent parts, the search warrant recited:

> Affidavit having been made before me by .....
> .....
> that he (is positive) that (on the premises known as) 4107 8th Street, N. W., Washington (a two story brick dwelling occupied by Mrs. Dorothy D. Turner) in the District of Columbia, there is now being concealed certain property, namely Heroin, Syringes, Tourniquets, Cookers, and paraphernalia used in the preparation of Heroin for retail. Any other paraphernalia used in the preparation and dispensation of Heroin and any other narcotic drugs. Any other narcotic drugs illegally held which are in violation of U. S. Code Title 26, Section 2553(a), and which are being held illegally and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the foregoing grounds for application for issuance of the search warrant exist.

The warrant stated none of the facts upon which it was issued. It recites mere conclusions. This Court's definition of "probable cause" in *Brinegar* v. *United States*, 338 U. S. 160; 93 L. ed. 1879 is as follows:

> "The substance of all the definitions of probable cause is a reasonable ground for the belief of guilt."

It goes without saying that the warrant contained no "probable cause" as defined by this Court. It is to be noted that the warrant states that affidavit was made before the Commissioner that certain property was concealed in the premises, Narcotics contraband and "ANY OTHER* paraphernalia used in preparation and dispensation of Heroin and ANY OTHER* narcotic drugs. ANY OTHER* narcotic drugs illegally held . . ." Certainly this does not indicate grounds for the belief that ANY contraband was concealed in the premises.

The warrant states that the Commissioner is satisfied that there is probable cause to believe that the property is concealed in the premises and that grounds do exist. This is nothing more than a conclusion. The warrant did not state the FACTS upon which he based his belief. This language does not imply any reasonable grounds for the belief that *ANY OTHER* contraband was being concealed in the premises. In *Byars* v. *United States,* 273 U. S. 28 L. ed. 520, this Court said:

> "The information upon which the search warrant was issued states only that affiant 'has good reason to believe and does believe the defendant has in his possession' such intoxicating liquors, instruments and materials. The warrant clearly is bad if tested by the 4th Amendment and laws of the United States."

Petitioner says that the "probable cause" referred to in Rule 41(c) is of the same kind, type and character as the "probable cause" referred to in the Fourth Amendment. Further, the "probable cause" required to be stated in the warrant is not different from the "probable cause" required to be shown in an affidavit in support of application for search warrant. "*Probable Cause*" required in

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* Emphasis supplied.

the affidavit means the FACTS upon which a reasonable ground for belief is based.[1]

Insofar as the research of counsel has been able to disclose, the proposition herein urged was presented to this Court only on one occasion: *Grau* v. *United States*, 287 U. S. 124, 77 L. ed. 212. In that case the Court recognized the question but did not decide the issue and in that connection said:

> "The assertion that the warrant is void for failure to observe the statutory requirement that the 'particular grounds or probable cause' for issuance; and for the further reason that it is based on affidavits which do not set forth the facts tending to establish the grounds of application or probable cause for believing that they exist. We need not consider the alleged defect of the warrant, as we think the objection to the affidavits well taken, and the warrant without lawful foundation."

One whose property is being searched pursuant to a search warrant is entitled to know the particular grounds upon which such a drastic action is being taken. That right existed under prior law (Espionage Act). The Federal Rules of Criminal Procedure merely re-enacted existing law in this respect.

As used in the Rule, the term "grounds" and term "probable cause" are used to describe more fully the requirement set forth by each. The word "*grounds*" means, the "data, premises, or evidence on which a conclusion, a theory, a blief, etc. rests for support . . . hence, a sufficient or good reason; as, to have *ground* for complaint."[2]

It is not necessary here to reiterate that the GROUNDS may be shown by stating FACTS. The search warrant was

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[1] *Giles* v. *United States*, 284 F. 208; *Lochnane* v. *United States*, 2 F. 2d 427; *Wagner* v. *United States*, 8 F. 2d 581; *Hagen* v. *United States*, 4 F. 2d. 801; *Maccieno* v. *United States*, 9 F. 2d 61 reversed by this Court on confession of error without opinion, *Maccieno* v. *United States*, 270 U. S. 629, 70 L. ed. 769.

[2] Webster's Collegiate Dictionary, 5th Ed.

completely lacking in a statement of the facts upon which is was issued.

This Court, being again presented with the issue raised, but not decided in *Grau* v. *United States*, 287 U. S. 124, 77 L. ed. 212 should decide this question of great importance, for the future guidance of Courts. Though Rule 41(c) was not in existence at the time of the *Grau* decision, supra, the problem is the same. There is a present need for a definition by this Court of the requisites of Rule 41(c) as to the validity of search warrants issued thereunder.

II.

THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL.

A.

There Was No Competent Evidence That Petitioner Participated in a Sale of Narcotics to Nedab Not in Pursuance of a Written Order Form.

B.

Proof of Ownership of Rooming House Premises by Petitioner and His Presence Therein at a Time When Narcotics Were Found in the Kitchen of Said Premises Was Not Sufficient to Show Violation by Petitioner of 26 U. S. C. 2553(a) and 21 U. S. C. 174 Jointly With Another Person Found in the Premises With Incriminating Evidence on Her Person.

The case below was submitted to the jury on four counts of the indictment. Count 12 charged that petitioner and Elaine Lee jointly sold or transferred eight capsules of a narcotic to one Eugene Nedab, a violation of 26 U. S. C. 2554(a). Count 13 charged petitioner and Lee jointly with facilitation of the concealment and sale of the eight capsules of narcotics after illegal importation, a violation of 21 U. S. C. 174. Count 16 charged petitioner and Lee with the joint purchase of 72 capsules of narcotics not from or in the original stamped package, a violation of 26 U. S. C. 2553(a). Count 17 charged petitioner and Lee

with the joint facilitation of the concealment and sale of the 72 capsules of narcotics charged in count 16 after illegal importation. Petitioner was found guilty on all four counts.

A brief summary of the pertinent evidence adduced at the trial with respect to petitioner is as follows:

A police department under-cover officer, Dante Longo had on four previous occasions purchased narcotics from one, Eugene Nedab, a known dope peddler. (R. pg. 31) On April 22, 1952 Longo met Nedab and purposed to again buy narcotics from him. (R. pgs. 31, 60) Officer Longo drove Nedab to the vicinity of premises owned by petitioner after having given Nedab money, the serial numbers of which had been recorded. The money had also been treated with "counter-glow" powder. (R. pg. 29) Nedab was not an "informer" and was, therefore, not searched. Nedab left Longo's car, disappeared from the view of Longo (R. pg. 30) and was observed by another officer to approach the premises of petitioner, to enter the premises with petitioner (R. pg. 80), and thereafter to emerge and enter the car of Longo. Nedab then handed Longo eight capsules of narcotics. (R. pg. 30) Shortly thereafter petitioner's premises were entered under color of a search warrant. Inside the premises the officers found petitioner, his co-defendant, Elaine Lee and one Winston. The premises of petitioner contained five bedrooms. Each bedroom was rented to a different individual including one room to co-defendant, Elaine Lee, (R. pg. 102) and one bedroom rented to one Lloyd Chaney, a dope peddler but not known to petitioner as such. (R. pg. 63) Chaney was not present on the occasion of the entrance of the officers under color of the search warrant. Petitioner and Elaine Lee were immediately arrested. After an extensive search a "Sal Hepatica" bottle containing 72 capsules of a Heroin mixture was found in the kitchen sink. The kitchen was used in common by all of the roomers in the rooming house. Out of the presence of petitioner co-defendant, Elaine Lee

made a statement incriminating herself and petitioner. This oral statement was ruled by the trial court to be not admissible as against petitioner.[1]

There was no evidence whatsoever to show any concert of action between petitioner and Elaine Lee. Elaine Lee was found in possession of some of the money given by Officer Longo to Nedab and her hands revealed under an ultra violet lamp, that she had handled the money marked with the counter-glow powder.

In the absence of any evidence to connect petitioner with Elaine Lee, there was no warrant in the conviction of petitioner as a joint participant in the alleged sale of the narcotics to Nedab. Nedab was not a witness and there was no evidence that he did not have the requisite "*Order Form*" prescribed by 26 U. S. C. 2554(a).

The decisions of the United States Circuit Courts of Appeal are divided on the question as to whether or not the government must prove that a claimed sale was not in pursuance of a written order form.[2] It is important, therefore, that this Court resolve the question for the future guidance of appellate and trial Courts. Petitioner says that if the burden of proving that a sale *was* made in pursuance of a written order form is cast upon a defendant then the statute would be unconstitutional. However, if

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[1] *Mora* v. *United States*, 190 F. 2d 749; *Bass* v. *United States*, 20 App. D. C. 232; *Sorenson* v. *United States*, 143 F. 820; 168 F. 785; *Madigan* v. *United States*, 23 F. 2d 180.

[2] The following decisions appear to hold that proof of the fact that a sale of narcotics was made not in pursuance of a written order form is essential and necessary: *Linder* v. *United States*, 268 U. S. 5, 17; 45 S. Ct. 446, 69 L. ed. 619, 39 A.L.R. 229; *United States* v. *Behrman*, 258 U. S. 280, 287; 42 S. Ct. 303; 66 L. Ed. 619; *Mitchell* v. *United States*, 3 F. 2d 514; *Glatzmayer* v. *United States*, 84 F. 2d 192.

The following decisions appear to hold that proof that the sale of narcotics was not made pursuant to a "written order form" is not necessary: *Chin Gum* v. *United States*, 149 F. 2d 575; *Sauvain* v. *United States*, 31 F. 2d 302; *Martinez* v. *United States*, 25 F. 2d 302; *Nigro* v. *United States*, 117 F. 2d 624.

such meaning is not read into the statute it could be sustained and it is a cardinal rule that a statute must be construed in such fashion as to uphold its constitutionality whatever possible. *Linder* v. *United States,* 268 U. S. 5, 45 S. Ct. 446, 69 L. Ed. 619.

Aside from the fact that there was no proof that the alleged sale made jointly by petitioner and Lee to Nedab was not pursuant to a written order form, there are other serious questions as to the propriety of the submission of the case to the jury on these counts. The government offered no evidence as to any connection between petitioner and co-defendant, Lee. It was admitted that Lee was a roomer in the house of petitioner but it was not shown by any competent evidence that petitioner had any dealings whatsoever with Lee. It is plainly apparent, therefore, that petitioner's conviction of selling the eight capsules jointly with Lee to Nedab was wrongful.

Nedab was not an informer and was himself convicted of the sale of the same eight capsules of narcotics here in question to Officer Longo. (R. pgs. 60, 65) Nedab was a known dope peddler and it was not shown that Nedab did not have the capsules of narcotics in question on his person before entering the premises of petitioner, for he was not searched. (R. pg. 64) To prove a case of this sort by circumstantial evidence it is necessary that the alleged "purchaser" be first searched to ascertain whether or not he had narcotics on his person. *United States* v. *Pisano,* 193 F. 2d 355; *Fletcher* v. *United States,* 81 App. D. C. 306, 158 F. 2d 321. The *Pisano* case, supra is especially adapted to the facts herein insofar as counts 12 and 13 of the indictment are concerned. In *Hubby* v. *United States,* 150 F. 2d 165, the conviction of the defendant who had not been shown to be in concert with the individual who actually made a sale of narcotics was reversed. That case, also is particularly applicable here.

The 72 capsules of narcotics found in premises of petitioner in a sink used in common by all of the roomers in

the house, one of whom, Chaney, was a dope peddler, could not possibly be said to have been possessed by petitioner within the meaning of 26 U. S. C. 2553(a).

In *Eng Jung* v. *United States,* 46 F. 2d 66 a conviction for concealing narcotics after illegal importation was reversed when it appeared that, as here, narcotics were found in a rooming house let to numerous persons by defendant, upon the ground that there was no evidence that the narcotics found were in his possession or under his control. The factual situation in that case was very similar to the instant case. The decision of the United States Court of Appeals for the District of Columbia is therefore in conflict with the decision of the United States Court of Appeals for the Third Circuit in the *Eng Jung* case, supra. This is another reason why this Court should hear this case.

Petitioner's point raised by the denial of his motion for judgment of acquittal at the close of all the evidence involves the interpretation and construction of a United States Statute in a matter wherein the decisions of Circuit Courts of Appeals are in conflict. Petitioner urges this Court to finally resolve these questions of great importance not heretofore decided by this Court.

III.

THE DENIAL OF PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNTS 12 AND 13 OF THE INDICTMENT UPON THE GROUNDS OF FORMER JEOPARDY AND RES JUDICATA WAS ERROR.

Prior to trial the Court partially granted petitioner's motion for a bill of particulars. The government filed a bill of particulars, stating:

> "1. The eight capsules referred to in counts 12 and 13 of the indictment were delivered to Eugene Major Nedab at one and the same time as the seven capsules referred to in counts 14 and 15 of the indictment (R. pg. 15)"

Counts 12 and 13 of the indictment (R. pg. 11) charged a sale of eight capsules of narcotics by petitioner jointly with co-defendant, Elaine Lee on April 22, 1952 to Eugene Nedab and the facilitation of the concealment and sale of the same after illegal importation. Counts 14 and 15 of the indictment (R. pg. 11) charged a sale of seven capsules of narcotics by petitioner jointly with co-defendant, Elaine Lee on April 22, 1952 to Eugene Nedab and the facilitation of the concealment and sale of the said seven capsules of narcotics after illegal importation. The bill of particulars indicated only one transaction such that only *one* "order form" would have been necessary and there could have been but a single concealment after illegal importation.

Petitioner's motions to dismiss counts 12, 13, 14 and 15 of the indictment on the grounds of duplicity (R. pg. 13) and to strike the said counts were denied. (R. pg. 14) During the second day of the trial the government dismissed counts 14 and 15 of the indictment. (R. pg. 84) At the close of the government's case, petitioner moved to dismiss counts 12 and 13 of the indictment on the grounds of former jeopardy and res judicata. (R. pg. 99) This motion was renewed at the close of all the evidence and was denied. (R. pg. 103)

The government admitted that Nedab was to purchase 15 capsules of narcotics and that he turned over to Officer Longo eight capsules; that he was arrested and for the first time searched; that the search of Nedab revealed seven additional capsules on the person of Nedab. (R. pgs. 22, 23)

The government "*split*" the single transaction into two pairs of counts. In counts 12 and 13 eight of the 15 capsules were treated and in counts 14 and 15 the remaining seven capsules were alleged to have been sold and concealed. The government dismissed counts 14 and 15 during the course of trial. (R. pg. 84) Petitioner says that this amounted to an adjudication upon the merits of the single

transaction. The motion of petitioner to dismiss counts 12 and 14 or for a judgment of acquittal as to counts 12 and 13 upon the grounds of former jeopardy and res judicata were denied. This was error. According to the government's proof and bill of particulars there was but the single transaction involving Nedab, a sale or transfer of 15 capsules of narcotics. The bill of particulars left no doubt as to the single nature of this transaction. When the government dismissed counts 14 and 15 which had to do with a certain portion of the whole transaction, such dismissal operated as a bar to the further prosecution of counts 12 and 13. A prosecution for any part of a single crime ordinarily bars a further prosecution based on the whole or part of the same crime. 22 *C. J. S.* 422. The cases supporting petitioner's position in this regard are legion.[1] Petitioner says, therefore, that he was entitled to a judgment of acquittal as to counts 12 and 13 of the indictment. Having been once put in jeopardy as to counts 14 and 15, their dismissal during trial was an adjudication upon the merits and compelled an acquittal as to all matters wholly or partially charged in those counts. In *Hughes* v. *United States*, 95 F. 2d 530 the Court said:

> "It may be conceded that if the same offense is charged in two counts of an indictment or in two indictments consolidated for trial, acquittal on one count will bar conviction on the other. *Speiller* v. *U. S.*, 2 Cir., 31 F. 2d 682; *Bortsch* v. *Snook*, 5 Cir., 36 F. 2d 155. But in considering this question the test of identity is whether the same evidence will support both counts."

---

[1] *United States* v. *De Angelo*, 138 F. 2d 466; *Hughes* v. *United States*, 95 F. 2d 538; *Bortsch* v. *Snook*, 38 F. 2d 155; *Speiller* v. *United States*, 31 F. 2d 682; *United States* v. *Adams*, 281 U. S. 202, 74 L. ed. 887; *Boyle* v. *United States*, 22 F. 2d 547; *People* v. *Preciado*, (Calif.) 160 P. 1090; *Gates* v. *State*, 271 S. W. 632.

With respect to the test of identity mentioned in the *Hughes* decision, supra, the evidence of the alleged transfer by petitioner to Nedab of the total of the 15 capsules was the only evidence that could or would have supported all four counts herein involved.

Petitioner having been put in jeopardy on counts 14 and 15 and having received a dismissal of these counts at the hands of the Court, upon the motion of the prosecution, could not thereafter be found guilty of the same identical crimes involving the violation of the same statutes, the same evidence, and indeed, the self-same offenses.

This question is entirely novel, is one of importance and one that should be passed upon by this Honorable Court.

CONCLUSION

It is respectfully submitted that the questions raised herein indicate grave errors relative to novel questions not heretofore decided by this Court and that they warrant exercise of this Court's supervisory jurisdiction by the issuance of a Writ of Certiorari.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 103

JAMES S. TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the Court of Appeals (R. 124–125) is reported at 211 F. 2d 652.

JURISDICTION

The judgment of the Court of Appeals was rendered on April 1, 1954 (R. 126). By order of Chief Justice Warren, the time for filing the petition for a writ of certiorari was extended to May 31, 1954 (R. 128), and the petition was filed on May 28, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the warrant for the search of petitioner's premises was deficient because the details set forth in the affidavit submitted in applying for the warrant were not incorporated in the warrant itself.

2. Whether there was sufficient evidence to support petitioner's conviction.

3. Whether proof that a sale of narcotics was not made pursuant to a written order form was necessary to a conviction under 26 U. S. C. 2554 (a).

4. Whether the dismissal during the trial of two counts involving seven capsules of heroin barred, under principles of double jeopardy or *res judicata,* trial on other counts involving eight additional capsules delivered at the same time.

STATUTE AND RULES INVOLVED

26 U. S. C. 2554 provides in pertinent part:

> (a) General requirement.
>
> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.
>
> * * * * *
>
> (c) Other exceptions.
>
> Nothing contained in this section, section 2563, or section 2564 shall apply—

(1) Use of drugs in professional practice.

To the dispensing or distribution of any of the drugs mentioned in section 2550 (a) to a patient by a physician, dentist, or veterinary surgeon registered under section 3221 in the course of his professional practice only: * * *.

Rule 41 (c), F. R. Crim. P., provides:

(c) ISSUANCE AND CONTENTS.—A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant

> may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

STATEMENT

Petitioner was convicted in the United States District Court for the District of Columbia on counts 12, 13, 16, and 17 (R. 16) of an indictment charging various violations of the narcotics laws.[1] Counts 12 and 13, naming petitioner and codefendant Elaine Lee, charged the sale and concealment of eight heroin capsules (R. 11); counts 16 and 17 charged the purchase, sale and concealment of 72 capsules (R. 12). Petitioner was sentenced to concurrent sentences of imprisonment of 20 to 60 months and to fines of $100 each, on counts 12 and 13; and to similar concurrent sentences and fines on counts 16 and 17, the latter to run consecutively with the sentences imposed under counts 12 and 13 (R. 16–17). On appeal the judgment was affirmed by the Court of Appeals (R. 126).

Prior to trial, petitioner unsuccessfully (R. 121–122) moved to suppress certain property seized under a search warrant from premises owned by him on the ground, *inter alia,* that the warrant was fatally defective upon its face (R. 12–13).

---

[1] Counts 1 through 11 and 14 and 15 were dismissed on the Government's motion during the trial (R. 84).

The evidence adduced at the trial and at the hearing on the motion to suppress may be summarized as follows:

Six officers of the Narcotic Squad of the District of Columbia Metropolitan Police Department, including Private Dante Longo, an undercover man, were assigned to investigate the activities in the 4100 block of 8th Street NW., Washington, D. C. At various times on April 5, 7, 9, 10 and about 12:30 p. m. on April 22, 1952, these officers saw numerous people enter 4107 8th Street and depart within a few minutes. (R. 4–7.) During this period of observation, Longo, together with either one Louise Rucker or Eugene Nedab, known narcotic peddlers who were unaware of Longo's identity (R. 65), would drive up and park near 8th and Taylor Street. Louise Rucker or Nedab would leave the car and enter 4107 8th Street NW. Upon returning to Longo within a few minutes, each would give him capsules containing white powder, which upon analysis were found to contain narcotics. (R. 4–7, 60.) On one occasion, on April 3, 1952, prior to these observations, Longo purchased narcotics in this area from Louise Rucker (R. 4), and on April 5, he observed six heroin capsules in her possession after she left the 4107 premises. In response to a question from Longo as to whether he could purchase heroin from her she said she had purchased those in her possession for someone else. (R. 4–5.)

On the basis of these observations and events which were set forth in considerable detail in the supporting affidavit and on the basis of reliable information obtained from other sources that narcotic drugs were being sold and kept on the premises of 4107 8th Street NW., a day and nighttime search warrant was issued on the afternoon of April 22, 1952 (R. 7). That warrant recited in part as follows (R. 2–3):

> Affidavit having been made before me by Pvt. Sherwood H. Herring, Pvt. Irvin W. Brewer, Prob. Det. Seymour Raboy, Det. Sgt. Joseph A. Gabrys, Pvt. Dante Longo, and Prob. Det. Guy W. Holcomb, Jr. Narcotic Sqd., MPDC, that he (is positive) that (on the premises known as) 4107—8th Street, NW., Washington (a two story brick dwelling occupied by Mrs. Dorothy D. Turner) in the District of Columbia, there is now being concealed certain property, namely Heroin, Syringes, Tourniquets, Cookers, and paraphernalia used in the preparation of Heroin for retail. Any other paraphernalia used in the preparation and dispensation of Heroin and any other narcotic drugs. Any other narcotic drugs illegally held which are in violation of U. S. Code Title 26, Section 2553a, and which are being held illegally and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the (premises) above described and that the foregoing

> grounds for application for issuance of the search warrant exist.
>
> * * * * *

After the search warrant was issued, Longo and Nedab arrived by car at the corner of 8th and Taylor Streets NW., on April 22, 1952, about 6:30 p. m. Longo gave Nedab $20 in ten $1.00 bills and two $5.00 bills for the purpose of purchasing narcotics for him. Just prior thereto these bills had been marked with a fluorescent powder and their serial numbers recorded. Longo did not give Nedab any Department of Treasury form authorizing purchase of narcotics. (R. 29, 66, 87.) Nedab left the car went up to 4107 8th Street where he met petitioner sweeping the front walk. He had a short conversation with petitioner and then both went into the house. About five to seven minutes later, Nedab left the premises and returned to Longo's car. After giving Longo eight heroin capsules, he and Longo drove to 7th and Taylor Streets NW., where other narcotic officers arrested Nedab. They found 7 more such capsules in his possession. (R. 22, 30, 34, 35, 51, 88.)[2]

Meanwhile, members of the searching party arrived at petitioner's premises about 7 p. m. One group of officers went to the back door which opened into the kitchen, while another group went to the front door which opened into a hallway

[2] Nedab pleaded guilty to a narcotic charge and was given a 5-year sentence of imprisonment (R. 20, 60, 65).

which led into the kitchen at one end and into a staircase at the other end. Petitioner and Elaine Lee, apparently becoming aware of the impending search, ran out the back door, but upon seeing officers approaching hurried back into the kitchen. Through the front door (which apparently contained some glass) the officers saw petitioner coming out of the kitchen into the hallway. They knocked. When they failed to get an answer, they forced open the door, and saw petitioner running upstairs. (R. 76–79, 88–89, 91–93, 95–96.) They brought him down and arrested him, serving upon him a copy of the warrant without the supporting affidavit (R. 112–113).

When questioned and searched, petitioner denied knowing anything about narcotics and denied that he owned the premises which the tax records show as belonging to him and his wife. No narcotics, marked money or fluorescent powder were found on him. (R. 43, 74, 85, 86, 103.)

The officers found codefendant Elaine Lee sitting in the kitchen and arrested her. When asked if she had any money, she gave the officers $23.00. Some of these bills were found to contain fluorescent powder and their serial numbers coincided with the numbers on the money which Longo had given to Nedab with which to buy narcotics. In addition, fluorescent powder was found on her hands. (R. 47, 67–69, 72, 73.)

Upon searching the premises, the officers discovered in the kitchen sink among some dishes a

Sal Hepatica bottle which contained 72 heroin capsules, and on which there was fluorescent powder. They also found in a cabinet over the kitchen sink another such bottle which was empty but which contained traces of heroin inside. Neither bottle had any government stamps on it. (R. 37, 39–40, 52–53, 69, 80–81.) Both bottles, the 72 capsules found in one of them, the eight capsules which Nedab had given to Longo and the marked money taken from Lee were admitted in evidence over petitioner's objection (R. 98).

Testifying on his own behalf, petitioner admitted that he and his wife jointly owned the 4107 8th Street premises. He said that he was living there at the time of the trial but that he did not live there on April 22, 1952. He said that at that time he rented those premises to 5 roomers who used the kitchen and that he was there on that date planting flowers on the lawn. He denied any knowledge of the presence of narcotics on the premises and denied that he met Nedab in front of the house on that day, saying that he merely saw Nedab walking past his house. He also denied that he was attempting to flee when the officers entered the house, saying that he had gone upstairs to collect rent. (R. 102–108.)

ARGUMENT

1. Petitioner does not challenge the sufficiency of the showing of probable cause made to the Commissioner upon which the warrant for the

search of his house was issued. He merely asserts (Pet. 10–13) that the warrant did not state, as required by Rule 41 (c), the grounds or probable cause for its issuance. The warrant recites that an affidavit had been made by six named officers and the affidavit itself spells out probable cause in considerable detail (R. 2–3). Petitioner argues, however, that the recitals in the warrant do not meet the requirements of Rule 41 (c) because the detailed facts on which the conclusion of probable cause was based were not set forth therein. But Rule 41 (c) does not require such a recital. In fact, by providing that, with respect to the affidavits, the warrant shall state only the names of the officers who executed them, the rule negatives any requirement that the detailed facts which usually appear in the affidavits should also appear in the warrant. Since the names of those executing the affidavit appear in the warrant, petitioner could, if he chose, learn the detailed basis for the warrant by examining the affidavit. In essence, this question was attempted to be raised before this Court in the following cases in which this Court denied certiorari: *Shay and Brown* v. *United States,* decided February 19, 1954 (C. A. D. C.), not yet reported, certiorari denied, June 7, 1954; *Ledbetter* v. *United States,* 211 F. 2d 628 (C. A. D. C.), certiorari denied, 347 U. S. 977; and *Shaw* v. *United States,* 209

F. 2d 298 (C. A. D. C.), certiorari denied, 347 U. S. 905.

2. Petitioner challenges (Pet. 14–15, 16–17) the sufficiency of the evidence to support his conviction, arguing principally that his guilt cannot be inferred from the mere presence of narcotics in his house which was used by other persons. His argument overlooks the additional factors which, when viewed as they must be in the light most favorable to the Government (*Glasser* v. *United States,* 315 U. S. 60, 80), tend to prove his guilt. Prior to purchasing the 15 capsules on April 22 and about a half hour prior to the search which revealed the presence of narcotics in petitioner's house, Nedab, a known narcotic peddler, who had previously purchased narcotics at petitioner's house and who was then going into petitioner's house for the express purpose of purchasing narcotics, met petitioner in front of his house. After a short conversation, both went inside the house. Nedab departed a short time later with heroin capsules in his possession. Within a few minutes thereafter, when the searching party arrived at the premises, petitioner and codefendant Elaine Lee attempted to flee through the back door. Upon seeing the officers near the back door, petitioner said "Here they come" and ran upstairs.

The fact that the evidence indicated that the sale was consummated by Elaine Lee does not

exculpate the petitioner. From all the circumstances, a jury could properly infer that Elaine Lee made the sale at petitioner's house at his request. Both courts below having found the evidence sufficient to support the conviction, there is no occasion for further review by this Court. *Kann* v. *United States,* 323 U. S. 88, 93; *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589–590.

3. Petitioner's contention (Pet. 15–16) that the Government was required to prove that the sale to Nedab did not come within the class of sales excepted under 26 U. S. C. 2554 (a) is without substance. Section 2554 (a) provides in part as follows:

> It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

The decisions uniformly and consistently hold that generally it is not incumbent on the Government either to allege or prove facts to negative such an exception. Unless the face of the indictment indicates that such an exception may be applicable, it is up to the defendant in his defense to bring himself within such an exception. *Chin Gum* v. *United States,* 149 F. 2d 575 (C. A. 1); *Nigro* v.

United States, 117 F. 2d 624 (C. A. 8); *Martinez* v. *United States,* 25 F. 2d 302 (C. A. 5); *Hurwitz* v. *United States,* 299 Fed. 449 (C. A. 8); *Manning* v. *United States,* 275 Fed. 29 (C. A. 8). The cases upon which petitioner relies to support his asserted conflict on this point involve indictments against physicians, where the indictments on their face show that the exception may apply.

4. During the trial, the court, on the Government's motion, dismissed counts 1 through 11 and 14 and 15 (R. 84). Counts 14 and 15 involved the 7 capsules of heroin delivered by petitioner to Nedab at the same time as the eight capsules which were the subject of counts 12 and 13. Petitioner contends (Pet. 17–20) that the delivery of the fifteen capsules constituted only one sale, and hence that the dismissal of counts 14 and 15 rendered the principles of double jeopardy and *res adjudicata* applicable to the further prosecution of the undismissed counts 12 and 13. This contention is frivolous. By its very definition double jeopardy involves a defendant who is placed in jeopardy in a second prosecution. *Collins* v. *Loisel,* 262 U. S. 426, 429; *Kepner* v. *United States,* 195 U. S. 100. Here there was only one proceeding, and, even if the two groups of counts did involve the same offense, the action then amounted merely to an election to proceed on one charge rather than another.

Equally inapplicable to the continued prosecution of counts 12 and 13 is the doctrine of *res judicata* which applies only when there is a second proceeding after there has been an adjudication on the merits in the first proceeding. Obviously this is not the case here. *Aetna Life Ins. Co.* v. *Eaton,* 43 F. 2d 711 (C. A. 2), certiorari denied, 282 U. S. 887; *Ledbetter* v. *Wesley,* 23 F. 2d 81 (C. A. 8), certiorari denied, 276 U. S. 631; *Brown* v. *Fletcher,* 182 Fed. 963 (C. A. 6), certiorari denied, 220 U. S. 611.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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